



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 24, 1995

Mr. David W. Hilgers
Hilgers & Watkins
San Jacinto Center, Suite 1300
98 San Jacinto Boulevard
Austin, Texas 78701

OR95-091

Dear Mr. Hilgers:

As counsel for the Austin-Travis County Mental Health-Mental Retardation Center (the "center"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 31167.

On December 16, 1994, the center received a request for the following information:

Files on all roof repair or maintenance contracts entered into by Travis County Mental Health-Mental Retardation since Oct. 1, 1991, including but not limited to:

1. The name, address and telephone number of all private companies receiving contracts or subcontracts for such work.
2. The name of owners or principals of these companies.
3. The location of the work site specified in these contracts or subcontracts, a description of the work to be accomplished and the amount to be paid by Travis County Mental Health-Mental Retardation.
4. Invoices showing actual amounts paid.
5. Any internal memoranda related to these contracts.

The center has released some information, but you raise various exceptions in the act to the required public disclosure of certain information pertaining to a particular investigation conducted by your law firm. Your law firm investigated an allegation that

the award of a contract for roof installation for the center was the result of bid rigging and prepared a final report of its findings. You sought a decision from this office on January 6, 1995, as to whether the attorney notes made during the investigation and the final report with accompanying addenda may be excepted from required public disclosure under sections 552.101, 552.103, 552.104, 552.107(1), 552.110, and 552.111 of the Government Code. We conclude that with the exception of a small portion of the information that is protected under section 552.101 of the Government Code in conjunction with the common-law right to privacy, the information is public information.

Section 552.301(a) of the Government Code provides that:

A governmental body that receives a written request for information that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. *The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.* [Emphasis added].

Since the center received the request on December 16, 1994, and requested a decision from this office on January 6, 1995, the center failed to seek our decision within the ten-day period mandated by section 552.301(a). Because the center did not request an attorney general decision within the deadline provided by section 552.301(a), the requested information is presumed to be public information. Gov't Code § 552.302; see *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ).

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. The center has not raised any specific compelling reasons to overcome the presumption that the information is public. The center asserts that numerous exceptions to disclosure in the act are applicable. When an exception to disclosure that is designed to protect the interests of a third party is applicable, the presumption of openness may be overcome. See Open Records Decision No. 552 (1990).

You raised several exceptions to required public disclosure that are not designed to protect the interests of a third party: sections 552.103, 552.104, 552.107(1), and 552.111 of the Government Code. The applicability of such exceptions to information is not by itself a compelling reason to overcome the presumption that the requested information is public. See Open Records Decision Nos. 630 (1994) (fact alone that information may be excepted by § 552.107(1) does not constitute compelling reason to overcome presumption); 592 (1991) at 8 (statutory predecessor to Gov't Code § 552.104 protects interests of governmental body and may be waived); 591 (1991) at 2 n. 2 (fact

alone that information may be excepted from disclosure by statutory predecessor to Gov't Code § 552.103 does not constitute compelling reason to overcome presumption); 515 (1988) (fact that information may be excepted by statutory predecessor to Gov't Code § 552.111 does not constitute compelling reason to overcome presumption). Therefore, we will not consider the application of sections 552.103, 552.104, 552.107(1), or 552.111 of the Government Code to the requested information.

We will, however, consider the application of section 552.101 of the Government Code, which incorporates the common-law right to privacy and the informer's privilege, and section 552.110, which may protect a third party's commercial or financial information in certain circumstances or as it might constitute trade secrets. Section 552.101 excepts from required public disclosure information considered to be confidential by law, including information made confidential by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person *and* if the information is of no legitimate concern to the public. *See id.* at 685.

The information contains the names of the following individuals: the complainant, center employees involved in the review of the bids and the award of the contract, and contractors who bid for the contract. We conclude that except for a small portion of financial information that is unrelated to the bidding, section 552.101 in conjunction with the common-law right to privacy does not protect the information from required public disclosure. We have marked the information that can be withheld. We believe the public has a legitimate interest in information concerning allegations of improprieties in the award of a government contract. *See* Open Records Decision Nos. 474 (1987) at 4; 405 (1983) at 2.

Section 552.101 of the Government Code also incorporates the informer's privilege, which has been recognized by Texas courts. *See* Open Records Decision No. 515 (1988). You assert that the informer's privilege is applicable to the name of the complainant.

The informer's privilege is really a governmental body's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officials having a duty of enforcing particular laws. *See id.*; *see also Roviato v. United States*, 353 U.S. 53 (1957). A claim under the informer's privilege is waivable by the governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 (1990) at 6. The purpose of the privilege is to protect informers from retaliation and thus encourage them to cooperate with law enforcement efforts. *See* Open Records Decision No. 515.

The documents you enclosed reveal that the person who would have reason to retaliate against the complainant knows the complainant's identity. The informer's privilege aspect of section 552.101 does not apply when the subject of the information already knows the informer's identity. See Open Records Decision No. 208 (1978). Consequently, the center may not withhold the identity of the complainant based on the informer's privilege aspect of section 552.101 of the Government Code.¹

You also raise section 552.101 in connection with two discovery privileges in the Texas Rules of Civil Procedure: rule 166b(3)(c), which applies to witness statements, and rule 166b(3)(d), which applies to party communications. Discovery privileges apply in the context of a court proceeding. Tex. Rules Civ. Proc. 2 (Scope of rules); see Open Records Decision No. 575 (1990) at 2. Therefore, discovery privileges are not covered under section 552.101 of the Government Code. See Open Records Decision No. 575. The center may not withhold any of the requested information based on section 552.101 as information within a discovery privilege.

Finally, we consider your section 552.110 claim. Section 552.110 protects third party property rights and provides that:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision is [excepted from required public disclosure.]

You state that this exception applies to information from roofing contractors. In particular, you raise this exception in regard to information about a certain roof system product, which is contained in "Exhibit B," the bid of the winning bidder, which is part of "Exhibit D," and information about the bid opening and the evaluation chart, which is "Exhibit I."

Section 552.110 refers to two types of information: (a) trade secrets, and (2) commercial or financial information obtained from a person. None of this information is "commercial or financial information obtained from a person . . . and confidential by statute or judicial decision." See Open Records Decision No. 592 (1991).

Nor is this information a trade secret. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). That definition states in part that a trade secret is:

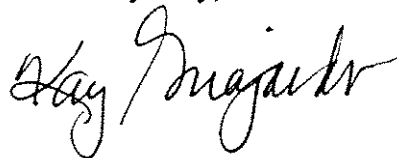
¹We note that in your correspondence with this office, you frequently cite Open Records Decision No. 297 (1981) as authority to withhold the witness names in the report. That decision held that the city of Lubbock may withhold the names and statements of witnesses under the statutory predecessor to Government Code section 552.108 if the city determines that disclosure might either subject the witnesses to possible intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement officers. However, you have not raised section 552.108.

any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it . . . it is not simply information as to single or ephemeral events in the conduct of the business . . . but for continuous use in the operation of the business . . .

RESTATEMENT OF TORTS § 757 cmt. b (1939). The information does not meet the Restatement's definition of a trade secret. The bid is not information that is used continuously in the roofing company's business. Moreover, the bid evaluation chart is not used in a roofing company's business since it was created by center employees. As for the information about the roof system product, the report simply states that the winning bidder offered the product as a substitute for another roofing system specified in the request for proposals. Accordingly, we conclude that the center may not withhold any of the report based on section 552.110 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 31167

Enclosures: Marked documents

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